

FEB 14 1967

No. 20591

United States Court of Appeals

FOR THE NINTH DISTRICT

REDERI A/B SOYA, as owners of the Swedish
Motor Vessel *OTELLO*,

Appellant,

vs.

The SS. *GRAND GRACE*, her Engines, etc. and her
Owners, GRACE NAVIGATION CORPORATION,

and

The MV *JANE STOVE*, her Engines, etc., and her
Owners, LORENTZENS SKIBS A/B,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR
THE DISTRICT OF OREGON, HONORABLE JOHN F. KILKENNY,
DISTRICT JUDGE.

**REPLY BRIEF OF THE *OTELLO*, REDERI A/B
SOYA, APPELLANT**

FILED

JUN 29 1966

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and

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Statement

The appellant, *Otello*, submits this brief in reply to the respective briefs of appellee, *Jane Store*, and of appellee, *Grand Grace*.

The *Otello* regards the *Jane Store* as the active faulty offender in this collision and the *Grand Grace* as the passive faulty offender. Both appellee-offenders have adopted somewhat common grounds of defense to which we will reply first

she order her engines in readiness for use and that she station seamen at the anchor windlass in preparation for the simple operation of releasing the brake so as to pay out anchor chain if it became necessary. *Grand Grace*, being a steamer, would require 15 minutes or a half hour to warm up her engines for use;* and in respect of the seamen attending the windlass, it would require no more than a minute's time for him to comply with an order to stand by (R. 1291). These simple operations were not undertaken by the *Grand Grace*, so that when the *Otello* could not work herself clear into the channel because of the approach of the *Jane Stove*, the *Grand Grace* was negligently powerless to do anything to avoid the dragging *Otello*.

(c) *The principle of McAllister v. United States does not help the appellees.* It is not unexpected that appellees resort to *McAllister v. United States*, 348 U. S. 19 (1954), and its ruling that findings of fact are not to be modified unless clearly erroneous. But this Court, we need hardly mention, has upset fact findings as clearly erroneous where the primary facts admit of but one reasonable conclusion, as they do here, with respect to the *Grand Grace* and to the *Jane Stove*. *Hoppe v. Rittenhouse*, 279 F. 2d 3, 9 (9 Cir. 1960). Along similar lines, is the case of *Moran Bros., Inc. v. W. R. Yinger*, 323 F. 2d 699 (10 Cir. 1963), where the court stated, 702-703:

“Thus, while there is some evidence tending to support the court's finding, we are, nevertheless, on the entire evidence left with the definite and firm conviction that a mistake has been committed: It therefore follows that the finding of fact in question is clearly erroneous.”

The foregoing cases accord with the *United States v. Gypsum Co.*, U. S. 364, 395 (1948).

* Her engines could have been ready at an instant if they had been kept ready rather than completely shut down (R. 949).

The appellees also seem to find comfort in an attempted criticism of Supreme Court Admiralty Rule 46½, requiring the enunciation of specific findings of fact. The importance of the rule is self-evident, particularly in collision cases where facts are so preponderantly decisive. Adherence to this rule insures that the Appellate Court will have a clear and complete picture of the basis of a trial Court's decision. It enables an appellant duly to assert its rights of appeal and gives the Appellate Court an adequate basis to consider errors complained of in the findings. *Matton Oil Transfer Corp. v. The Dynamic, et al.*, 183 Fed. 999 (2nd Cir. 1941). We stand on this Court's ruling in *Gypsum Carrier, Inc. v. Handelsman*, 307 F. 2d 525, at 532, where the Court stated:

"We agree with appellant that findings in admiralty (as in civil litigation generally when tried to the court when sitting without a jury) should be sufficiently specific to permit fair appellate review of the manner in which the trial court resolved the issues upon which its judgement depends."

The foregoing accords with this Court's ruling in the same year in *Daido Lines v. Thos. P. Gonzales Corp.*, 299 F. 2d 669 (9th Cir. 1962).

d. *Findings of a Trial Court, unless independently composed, are subject to especially close scrutiny.*

Appellees' counsel do not dispute that the trial court accepted *in toto* the findings proposed by them, but irrelevantly argue that this was "customary". Custom cannot abrogate a Rule of the Supreme Court of the United States. Equally important is the fact that such "adopted findings are subject to closer scrutiny on appeal, as against those composed by the Court itself (*Otello* main brief, 8-10). Counsel's proposed findings are subject to the natural infirmities of interested advocacy, whereas making findings is purely a judicial function which is attended with strict impartiality. Comments of the Hon. E. Otis, at the Judicial Conference of the 8th Circuit, 1 F. R. D. 83, 85.

II. The cases relied upon by *Grand Grace* are inapplicable, and the "findings" in her favor are clearly erroneous.

The Oregon, 158 U. S. 186 (1895), and *The Europe*, 175 Fed. 596 (D.C. Or 1909) (*Grand Grace* brief, pp. 14-15), both involved vessels underway at 15 knots which were only seen by the anchored vessels seconds before the collision. Obviously the anchored vessels did not have time to take any action.

Villain & Fassio E. Compagnia v. Tank Steamer E. W. Sinclair, 207 Fed. Supp. 700 (S.D.N.Y. 1962) (*Grand Grace* brief, pp. 14, 28, 38) involved the *Sinclair*, which, proceeding at high speed in dense fog, made a sudden and unexpected course change near an anchored vessel, who had only a few seconds warning. It does not help appellees, since the *Otello* dragged slowly towards the *Grand Grace* for an hour and the *Grand Grace* took no action.

The Blue Goddess, 199 F. 2d 460 (C.A. 7 1952) (*Grand Grace* brief, pp. 14, 15) involved a collision between two unmanned pleasure craft.

The Louisiana, 3 Wallace 164 (1866) (*Grand Grace* brief, pp. 14-16) involved a collision with a grounded immobile vessel.

Finding of Fact 15 (pp. 15-16 *Grand Grace* brief), states the conclusion that the *Otello* was negligent, and solely at fault for the collision because she was a moving maneuvering vessel and collided with a vessel lying properly at anchor (R. 78). That is wrong on two counts.

The *Otello* was windborne and was not in full control of her movements, as an ordinary moving vessel would have been (R. 168-169). Also, she was not a moving vessel in the true sense of the word for her anchor was down (352-353). A vessel in such straits as was the *Otello* is particularly vulnerable when trying to maneuver out of any

anchorage and is given special consideration by the courts. *Isaac T. Mann*, 63 F. Supp. 339 (S. D. N. Y. 1945); *The Arfeld*, 42 F. 2d 745 (E. D. La. 1930).

The *Grand Grace* was not "lying properly at anchor" under the circumstances. Her engines were not ready to be used (R. 842).

Appellee *Grand Grace* apparently concedes that if the engines had been in a state of readiness, the *Grand Grace* might have maneuvered clear of the *Otello* (*Grand Grace* brief, pp. 36-37). Furthermore, the *Grand Grace* did not take appropriate action to avoid the collision by using her rudder to sheer her clear (R. 842, 843).

In *Finding 16(a)* (referred to *Grand Grace* brief, p. 16), the trial Court held that the *Otello* was negligent in dragging, not letting out more chain, and failing to use her second anchor. The *Otello*, as directed by her local pilot, had been securely anchored on the same anchor for two days prior to the collision (R. 165). Her performance was better than the *Grand Grace* and *Jane Stove*. Both the latter used only one anchor on the date in question (R. 284-290, 842). The *Jane Stove* dragged her anchor on three separate occasions on the date in question (R. 284-290), and not once did she use a second anchor or let out extra chain to hold her position (R. 284-290). Rather, she picked up her anchor, maneuvered to a new position. The *Grand Grace* herself never let out extra chain or dropped a second anchor (R. 842).

Although anchored on a long scope of chain, *Otello* started to drag slowly and this was promptly detected (R. 242). A pilot could not put out to her to change her position and *Otello's* pilot signals went unheeded (R. 174).

Since it took her an hour or more to drag one-half mile upstream to *Grand Grace's* position, *Otello* was dragging slowly at only about 1/10 of a length per minute.

Her master, in his seaman's judgment, decided he had best move ahead on his chain and let go a second anchor near his first anchor; that dropping a second anchor at once, necessarily on short scope, would not help (R. 176). If it were done, there was danger of the chains fouling (R. 242). As his planned operation continued his chain jammed across the stem (R. 176).

So *Otello* continued her slow drag, broadside to the wind (heading north), sounding danger signals, as she neared the *Antinous* (R. 176-181).

Appellee *Grand Grace* states (p. 17) that after *Otello* cleared the *Mary Olsen* (a barge anchored on *Otello's* port quarter), *Otello* still had half a mile of clear water before reaching the *Grand Grace*. Appellee's own witnesses indicated that the distance between the *Mary Olsen* and the *Grand Grace* was only about one-quarter mile, or about three ship lengths (Ex's 15D, 12AA). *Otello*, upon clearing the *Antinous*, then saw her chance to stop her drag toward *Grand Grace* and to go ahead to the north past *Antinous's* stern (R. 179). But the *Jane Stove* in unnecessarily heading between *Antinous* and *Otello* prevented *Otello* from moving northward into the clear (R. 179).

III. *Jane Stove's* mishandling clearly contributed to this collision and this is clearly demonstrated by the controlling evidence.

Appellee *Jane Stove* contends (pp. 8 and 9) that it was incumbent upon the *Otello* to prove that "the *Jane Stove* course took her sufficiently close to the *Otello* to critically impede the latter's navigation;".

The *Jane Stove's* master plotted the course of the *Jane Stove* on Exhibit 21A, 207 (App's Main Br. App. B).^{*} This

^{*} After consultation with attorney for the *Jane Stove* (R. 1394-1395, 1409).

exhibit clearly shows that the *Jane Stove* navigated well south of the main channel in Anchorage 1 (*Otello* Main Brief, pp. 19-20). The *Jane Stove* log book contains an entry made after consultation with attorney for the *Jane Stove* (R. 1419) which reads as follows:

“Approximately 1530 hours passed the *Otello* approximately one hundred meters off (which) had dragged and drifted down upon another anchored vessel, the *S.S. Grand Grace*” (R. 1406).

Jane Stove's attempt to dispute that testimony by references to the testimony of various witnesses not aboard the *Jane Stove* is plainly misdirected. Captain Pullen, master of the *Antinous* (*Jane Stove* brief, p. 11) testified: “* * * I know what I am on, I don't know exactly if she (*Jane Stove*) is on the range because I am not on that ship looking at the range” (R. 1629).

Jane Stove (p. 11) contends that the *Jane Stove* passed 900 feet (about two ship lengths) off the *Otello*. This hopeful estimate was the greatest given by any witness who testified either *de bene esse* or at trial. Even so, a passing distance of two ship lengths is dangerously close.

But, other witnesses testified that the *Jane Stove* passed 50 feet off the bow of the *Otello* (R. 592), 75 feet off the bow of the *Otello* (R. 183, 427), 300 feet off the bow of the *Otello* (R. 1406, *Jane Stove's* Master; Ex. 209, *Jane Stove* Deck Log Book). *Jane Stove's* interference could not be plainer.

Jane Stove's references (pp. 11 and 12) to the testimony of Captain Sundlof of the *Otello* are absurd. Captain Sundlof testified explicitly that the *Jane Stove* navigated on a course parallel to the Astoria Range, but not on the Astoria Range (Ex. 39, R. 191, 364).

He further testified that the *Jane Stove* cut across the anchorage grounds as she approached the *Otello* (R. 191,

364, Ex. 39). That is the controlling feature of Sundlof's testimony.

Jane Stove wrongly contends that the *Otello* made no effort to maneuver until very shortly before the collision (*Jane Stove* brief, pp. 13 and 14). That fact contention is contradicted by virtually every fact witness involved, even those adverse to the interests of the *Otello* (Ex. 10B—*Otello* Bell Book, Exs. 12AA, 12BB, 13G—diagrams by Captain and Chief Mate of *Grand Grace*, R. 216, 1073-1075—testimony of Captain Wang of *Grand Grace*, 1311-13—testimony of *Grand Grace* watch officer, 834). We refer to the overwhelming testimony that the *Otello* was maneuvering with her engines for more than thirty minutes before the collision (Ex. 10A, 15A, R. 216, 834, 1073-1075, 1311-13). The *Grand Grace* (brief, pp. 23-23) clearly sets forth the numerous maneuvers of *Otello* attempts to maneuver into the fairway.

The *Otello* could not maneuver to the westward, because the wind had forced her head to the north (R. 178). She did not head southward because this would take her into uncharted waters, well outside the channel (Ex. 4A, R. 298, 314-316).

Jane Stove admits (pp. 15-16) that the *Otello* sounded whistle signals, but contends that they were ambiguous, or inadequate. Apparently, *Jane Stove* was alone in doubt in this situation of plain danger (R. 841, 1713-1714, 1734-1735, 1284, 1313-1314). If one accepts her "doubt" she nevertheless should have held up (Pilot Rules 80.1, 80.7(b).)

Furthermore, the *Jane Stove* stresses in its attempted defense the alleged good repute and knowledgeability of her pilot (*Jane Stove* Br., p. 9). But the proved facts as to the handling of the *Jane Stove* by her pilot are the decisive factors. The claimed presenece of the *Jane Stove* pilot on the port wing of that vessel is disputed by the *Jane Stove*'s watch mate. The watch mate places the *Jane*

Stove pilot *not* out on the port wing of the bridge of that ship, but *on the starboard side in the wheel house* (R. 1496). Again, the Master of the *Jane Stove* testified that the *Jane Stove* did not pass off the *Otello's* bow at the allegedly generous distance given by the *Jane Stove* pilot, but passed only 300 feet off the bow of the *Otello* (R. 1406). Further, the *Jane Stove's* Master testified that the *Jane Stove* cut through the anchorage (Ex. 21A, 207). These are facts which condemn the *Jane Stove* in fault.

Additionally, it is noteworthy that of the 1798 pages of testimony taken in this case, only 116 pages consists of "live testimony" taken before the District Court.

Conclusion

We submit that the trial court's decree should be reversed to adjudge the appellees *Grand Grace* and *Jane Stove* responsible for the *Otello's* collision with the *Grand Grace*.

Respectfully submitted,

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of Counsel.

Dated: June 27, 1966.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DAVID C. WOOD

Appendix A *

OTELLO EXHIBITS

<u>Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
1	—	68	68	
1A	332	69	69	
1B	332	69	69	
1C	332	69	69	
1D	334	69	69	
1E	334	69	69	
1F	338	69	69	
1G	348	69	69	
1H	348	69	69	
1I	397	69	69	
2	—	68	68	
2A	415	69	69	
2B	456	69	69	
3	—	68	68	
3A	477	69	69	
3B	487	69	69	
3C	507	69	69	
3D	512	69	69	
4	—	68	68	
4A	524	69	69	
4B	533	69	69	
4C	533	69	69	
4D	533	69	69	
4E	534	69	69	
4F	537	69	69	
4G	537	69	69	
5	—	68	68	
5A	567	69	69	
5B	578	69	69	
6	—	68	68	
6A	586	69	69	
6B	595	69	69	
7	—	68	68	
8	—	68	68	
8A	629	69	69	
8B	629	69	69	
8C	636	69	69	

* Appendix to exhibits was inadvertently omitted in appellant's main brief.

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<u>Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
9	—	68	68	
10	—	68	68	
10A	675	69	69	
10B	676	69	69	
10C	682	69	69	
10D	683	69	69	
10E	683	69	69	
10F	684	69	69	
11	—	68	68	
11A	703	70	70	
11B	705	70	70	
11C	708	70	70	
11D	711	70	70	
11E	715	70	70	
12	—	68	68	
12A	1153	70	70	
12B	1172	70	70	
12C	1176	70	70	
12D	1193	70	70	
12E	1193	70	70	
12F	1193	70	70	
13	—	70	70	
13A	814	70	70	
13B	816	70	70	
13C	819	70	70	
13D	821	70	70	
13E	824	70	70	
13F	829	70	70	
13G	840	70	70	
13H	854	70	70	
13I	855	70	70	
13J	862	70	70	
14	—	68	68	
14A	982-83	68	68	
15	—	69	69	
15A	1311	69	69	
16	—	68	68	
16A	1293	70	70	
17	—	68	68	
17A	1271	70	70	
18	—	68	68	
19	—	68	68	
19A	951	69	69	
20	—	68	68	

A-3

<u>Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
21	—	68	68	
21A	1408	70	70	
21B	1414	70	70	
22	—	68	68	
22A	747	70	70	
22B	773	70	70	
23	—	68	68	
24	—	68	68	
24A	1487	70	70	
24B	1487	70	70	
24C	1490	70	70	
24D	1495	70	70	
25	—	68	68	
26	—	68	68	
27	—	68	68	
27A	1548	70	70	
28	—	68	68	
28A	1565	70	70	
28B	1571	70	70	
28C	1587	70	70	
29	—	68	68	
29A	1606	70	70	
29B	1657	70	70	
29C	1664	70	70	
29D	1690	70	70	
30	—	68	68	
30A	1718	70	70	
31	—	68	68	
31A	1763	70	70	
32	—	69	69	
32A	1785	70	70	
33	—	69	69	
33A	1804	71	71	
33B	1810	71	71	
33C	1852	71	71	
34	—	71	71	
35	—	71	71	
36A	—	71	71	
36B	—	71	71	
37	—	197	197	
38	—	71	—	
39	—	71	—	
40 A-G	—	267	267	
41 A-J	—	71	71	

A-4

<u>Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
42	—	71	71	
43	—	71	71	
44	—	71	71	
45	256	268	268	

GRAND GRACE EXHIBITS

101	1326	68	68
102	854	68	68
103	819	68	68
104	951	68	68
105	821	68	68
106	—	68	68
107	—	68	68
108	—	68	68
109	—	68	68
110	814	68	68
111	—	68	68
112	—	68	68
113	—	68	68
114	829	68	68
115	—	68	68
116	—	68	68
116A	1293	68	68
117	—	68	68
118	—	68	68
119	—	68	68
120	—	68	68
121	—	68	68
122	—	68	68
123	—	68	68

JANE STOVE EXHIBITS

201	—	67	67
202	—	67	67
203	—	67	67
204	—	67	67
205	—	67	67
206	—	67	67
207	747	67	67
208	1490	67	67
209	1487	67	67
210	1548	67	67